UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Michael Lopez
(Petitioner)

and

Lamons Gasket Company,
a Trimas Company
(Employer)
and

Case No. 16-RD-1597

United Steel, Paper and Forestry
et al. Union (USW)
(Union)

PETITIONER'S STATEMENT IN OPPOSITION
TO THE REQUEST FOR REVIEW

By and through his undersigned attorney, Petitioner Michael Lopez hereby files this Statement in Opposition to the Request for Review filed by the United Steel, Paper and Forestry et al. Union ("USW" or "union"). This Statement in Opposition is filed pursuant to NLRB Rules & Regulations § 102.67(e).

In its Request for Review, the union seeks to have the Board overrule its recent decision in Dana Corp., 351 NLRB 434 (2007), and thereby halt a secret-ballot election sought by employees who presented the Director of Region 16 with a valid showing of interest that they did not want to be represented by this union. The union's Request for Review, which is intended to stymie workplace freedom of choice, should be denied.

I. THE BOARD'S 2007 DECISION IN DANA CORP., 351 NLRB 434, SHOULD NOT BE REVISITED OR OVERRULED.

A). Employees' rights need to be protected via secret-ballot elections.

The decision in Dana Corp., 351 NLRB 434 (2007), was carefully considered by a five-member Board.[1] After the Board granted the initial Request for Review, Dana Corp., 341 NLRB 1283 (2006), it publicly solicited amicus briefs to assist with its analysis and make sure all interested parties were heard.[2] In response to the Board's solicitation, several dozen such briefs were filed. The USW (via the AFL-CIO) and other union amici filed briefs raising all of the points USW raises here.

Upon reviewing these extensive amicus briefs and the parties' briefs, the Board issued a well-reasoned decision in Dana Corp. that carefully balances the stability of relationships created by "voluntary recognition" with the need to protect employees' Section 7 rights to join a union or refrain from unionization. The Board properly recognized that, while there may be competing interests at stake, the paramount policy of the NLRA is to protect employees' right to freely join a union or to refrain from unionization under Section 7. See, e.g., Pattern Makers League v. NLRB, 473 U.S. 95 (1985) (paramount policy of the NLRA is "voluntary unionism"); Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) ("By its plain terms, thus, the NLRA confers rights only

---

[1] The rationale of the majority opinion in Dana Corp. is adopted herein by reference and will not be repeated at length.

[2] http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/DanaMetaldyneAmicusBriefs.html

on employees, not on unions or their nonemployee organizers . . . ."); " International Ladies Garment Workers v. NLRB, 366 U.S. 731, 738-39 (1961) (deferring to even a "good-faith" determination that a union has majority employee support "would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act--that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives"); Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 304, 307 (1974); NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969) ("secret elections are generally the most satisfactory--indeed the preferred--method of ascertaining whether a union has majority support"); Brooks v. NLRB, 348 U.S. 96 (1954) ("an election is a solemn and costly occasion, conducted under safeguards to voluntary choice").

Thus, the Board in Dana Corp. determined that the so-called "voluntary recognition bar" should be slightly modified, to give employees the opportunity for a secret-ballot election in the event that their employer's "voluntary recognition" of a particular union did not actually represent the employees' free choice. The Board decided to slightly alter – but not eliminate – the voluntary recognition bar, which continues to exist. The Board understood that its ruling would cause only minimal delay and interference with the newly formed "voluntary recognition" relationship, while greatly enhancing employee freedom of choice. Indeed, the USW admits that it is now finalizing, after eight (8) months of negotiations, a contract with the employer (USW Request for

Review at 4), so the fact that employees filed for a prompt decertification within forty-five (45) days of the voluntary recognition has in no way hampered or delayed the union's ability to negotiate a timely first contract.

The Board in Dana Corp. recognized that employees subject to "voluntary recognition agreements" need the safety value of a secret-ballot election because of frequent employer and union "back room deals" over recognition. In many such cases, employees are pressured or misled to sign union authorization cards which are then used as the basis for the "voluntary recognition." See, e.g., Duane Reade, Inc., 338 NLRB 943 (2003) (employer unlawfully assisted UNITE and unlawfully granted recognition).[3] Through its parent corporations (Trimas and the former Heartland Industrial Partners), the employer in this case (Lamons Gasket) has a history of signing neutrality and card

[3] The cases where an employer conspired with its favored union to secure "recognition" of that union are legion. See, e.g., Fountain View Care Center, 317 NLRB 1286 (1995), enforced, 88 F.3d 1278 (D.C. Cir. 1996) (supervisors and other agents of the employer actively encouraged employees to support the union); NLRB v. Windsor Castle Healthcare Facility, 13 F.3d 619 (2d Cir. 1994), enforcing 310 NLRB 579 (1993) (employer provided sham employment to union organizers and assisted their recruitment efforts); Kosher Plaza Super Market, 313 NLRB 74, 84 (1993); Brooklyn Hospital Center, 309 NLRB 1163 (1992), aff'd sub nom. Hotel, Hosp., Nursing Home & Allied Servs., Local 144 v. NLRB, 9 F.3d 218 (2d Cir. 1993) (employer permitted local union, which it had already recognized as an exclusive bargaining representative, to meet on its premises for the purpose of soliciting union membership); Famous Casting Corp., 301 NLRB 404, 407 (1991) (employer actions unlawfully supported union and coerced the employees into signing authorization cards); Systems Mgmt, Inc., 292 NLRB 1075, 1097-98 (1989), remanded on other grounds, 901 F.2d 297 (3d Cir. 1990); Anaheim Town & Country Inn, 282 NLRB 224 (1986) (employer actively participated in the union organizational drive from start to finish); Meyer's Café & Konditorei, 282 NLRB 1 (1986) (employer invited union it favored to attend hiring meeting with employees); Denver Lamb Co., 269 NLRB 508 (1984); Banner Tire Co., 260 NLRB 682, 685 (1982); Price Crusher Food Warehouse, 249 NLRB 433, 438-49 (1980) (employer created conditions in which the employees were led to believe that management expected them to sign union cards).

check agreements with the USW that are of dubious validity. See, e.g., United Steel, Paper & Forestry, Rubber, et al. Union v. Trimas Corp., 531 F.3d 531 (7th Cir. 2008); Patterson v. Heartland Indus. Partners, LLP, 428 F. Supp. 2d 714 (N.D. Ohio 2006), appeal dismissed as moot, 6th Cir. No. 06-03791. The terms of those neutrality and card check agreements are usually kept secret from the targeted employees, and such secrecy raises additional suspicion and uncertainty regarding the legitimacy of the voluntary recognition. Merk v. Jewel Food Stores Div. of Jewel Cos., Inc., 945 F.2d 889, 893-96 (7th Cir. 1991) (secret agreements between unions and employers violate federal labor policy); Aguinaga v. UFCW, 993 F.2d 1463, 1470-71 (10th Cir. 1993) (same). The USW's desire to eliminate secret-ballot elections and gag the employer from saying anything about the union raises similar concerns.

The union's claim that "industrial peace and stability" is the primary element of national labor policy (USW Request for Review at 6-7) is overstated and wrong. While voluntary recognition may be **an** element of the national labor policy, it does not trump the elements of federal policy that are actually favored: employee free choice via secret-ballot elections, unimpeded by union or employer pressure and misrepresentations. Gissel Packing, 395 U.S. at 602 ("secret elections are generally the most satisfactory--indeed the preferred--method of ascertaining whether a union has majority support"). Only where employees freely choose union representation does the collective bargaining process

become an element of federal labor policy.[4] This is especially true under Dana Corp., 351 NLRB at 439, where the Board made specific findings about the unfairness and anti-democratic nature of many union "card check" campaigns:

> [U]nion card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options. As to the former, misrepresentations about the purpose for which the card will be used may go unchecked in the voluntary recognition process. Even if no misrepresentations are made, employees may not have the same degree of information about the pros and cons of unionization that they would in a contested Board election, particularly if an employer has pledged neutrality during the card solicitation process.

See also Chamber of Commerce v. Brown, 128 S. Ct. 2408, 2414 (2008) ("§ 7 calls

---

[4] "Industrial peace" through collective bargaining can only come about where employee free choice is exercised and a true majority actually chooses to bargain through a union. "Industrial peace" does not occur when a non-majority union acts for employees.

> [T]he Act itself, in its substantive provisions, gives employees the fundamental right to choose whether to engage in collective bargaining or not. The preamble and the substantive provisions of the Act are not inconsistent. Read together, they pronounce a policy under which our nation protects and encourages the practice and procedure of collective bargaining **for those employees who have freely chosen to engage in it.**

Levitz Furniture, 333 NLRB at 731 (Member Hurtgen, concurring) (emphasis added).

This was reiterated in In re MV Transportation, 337 NLRB 770 (2002), where the Board overturned the so-called "successor bar" doctrine.

> It is well established that two of the fundamental purposes of the Act are (1) the protection and promotion of employee freedom of choice–choice with respect to the initial decision to engage in or refrain from collective bargaining, and choice regarding the selection of a bargaining representative; and (2) the preservation of the stability of bargaining relationships. The first of these is explicitly set forth in Section 7 of the Act. The second is a matter of policy and **operates with respect to those situations where employees have chosen a bargaining relationship.**

Id. at 772 (citations omitted) (emphasis added). Moreover, MV Transportation recognized that if there is a conflict, Petitioner's statutory rights under §§ 7 and 9(c)(1)(A)(ii) take precedence over lesser policies of "stable collective bargaining." Id. The Board further "observe[d] that the fundamental statutory policy of employee free choice has paramount value, even in times of economic change." Id. at 775.

attention to the right of employees to refuse to join unions, which implies an underlying right to receive information opposing unionization"); HCF, Inc., 321 NLRB 1320 (1996) (recounting union threats to force employees to sign authorization cards).

The USW cannot argue with a straight face that "card check" campaigns provide more protection of employee freedom than secret-ballot elections. Indeed, the USW admits with refreshing candor that "union organizers and supporters can intimidate, coerce, mislead or pressure employees during a card check campaign" (USW Request for Review at 12), and that "employees can be shielded from peer pressure in the freedom and secrecy of the ballot booth." (USW Request for Review at 13). Given these stark realities and the USW's admissions, the Board was correct in Dana Corp. in balancing the competing interests in the way it did, and reiterating that voluntary unionism is the paramount policy under the Act.

B). The evidence shows that the rule of Dana Corp. is working as intended.

The General Counsel has compiled statistics on voluntary recognitions and Dana decertification petitions that have occurred from 2007 (when Dana Corp. was issued) until February 2009. (The General Counsel's report can be found at http://www.nlrb.gov/shared_files/GC%20Memo/2009/GC%2009-06%20Rpt%20on%20Midwinter%20Mtg%20of%20the%20ABA.pdf). The General Counsel's statistics for voluntary recognitions and Dana decertification elections reveal the following:

> As of the end of February 2009, the Agency had received 612 requests for Dana notices. In connection with those requests for notices, the Agency had received 55

> petitions. Of that total, in 32 instances the petitions resulted in an election; in 12 instances the petitions were withdrawn; in 4 instances the petitions were dismissed; and there are 3 pending petitions.
>
> The results of the 32 elections held show that the voluntarily recognized union prevailed in 23 elections and in 9 elections the employees voted against continued representation by the voluntarily recognized union. In two of the losses, the voluntarily recognized union was defeated by a petitioning union.

Id.

What these statistics show is that Dana Corp. is working precisely as intended, and has done nothing to hinder or even delay the vast majority of voluntary recognitions from taking effect. But, in those egregious situations where the employees do not actually support the union that their employer "voluntarily recognized," the rule of Dana Corp. has been effective in ensuring the promise of the Act: that employees' Section 7 right to choose or reject unionization via majority rule is not "place[d] in permissibly careless employer and union hands." International Ladies Garment Workers, 366 U.S. at 738-39. Indeed, arguing against a secret-ballot election in cases where, as here, there may have been union and employer collusion via a secret neutrality agreement is simply un-American and smacks of totalitarianism. Since Dana Corp., the employees who successfully decertified unwanted unions or voted for representation by rival unions have surely had their Section 7 rights vindicated in a way that no unfair labor practice charge could ever do. Thus, the USW's claim that employees aggrieved by their employer's wrongful voluntary recognition can filed ULP charges under Section 8 or criminal charges under state law (USW Request for Review at 12-14) rings hollow, because those

actions would not provide the same relief as a swift secret-ballot election to decide with finality the employees' representational preferences.

Interestingly, the union admits that under Dana Corp. all employers granting voluntary recognition have a continuing duty to bargain with the recognized union, notwithstanding the filing of a Dana decertification petition or a petition by a rival union. (Union Request for Review at 16). Here, the USW admits that such bargaining has occurred and has resulted in a tentative agreement (USW Request for Review at 4), thus undercutting any notion that a Dana decertification petition hinders bargaining for a first contract.

Moreover, even if the union's "parade of horribles" did occur and the instant petition in fact caused a slight delay in the bargaining, so what? There is no reason to believe that a slight delay in the bargaining harms any employees or undermines the union's status. The Board in Dana Corp. was careful to mandate quick elections – within 45 days of posting the notice – precisely so that the bargaining could continue unimpeded in cases where the employees actually desire the union's representation. Here, it took 8-9 months of bargaining to produce a contract between the USW and Lamons Gasket, and there is no allegation that the filing of the Dana decertification petition hindered that process.

Finally, the union raises a red herring when it complains that, under Dana Corp., a recognition bar never goes into effect if the Dana notice is not posted. (USW Request for

Review at 17-18). The instant case does not present such facts, as the USW and Lamons Gasket promptly posted the Dana notice after the recognition, and the election was sought within the first 45 days. The union's "parade of horribles" about situations where no notice is ever posted and no recognition bar is ever created is hypothetical and is not properly before the Board at this time, because the facts in this case do not support such an argument.

C). The Board should insure workplace stability by adhering to stare decisis.

The Board's decision in Dana Corp. is approximately three (3) years old. The new rules have worked as intended, allowing the vast majority of voluntary recognitions to proceed while insuring a "safety valve" for employees who may be saddled with a minority union they have not genuinely chosen. Unions, employers, employees, NLRB Regional staff and the public have learned the rule in Dana Corp. and have followed it well. Hundreds of unions or employers have filed the necessary papers with NLRB Regional offices noting the voluntary recognition, and hundreds of employers have posted a simple Dana notice appraising employees of their rights. Where no petition is filed, the union continues to enjoy a complete and total "recognition bar." The system is workable and effective, and protects all parties' rights.

As such, the Board should not give way to pure partisan politics and sully its own reputation by suddenly reversing a carefully considered decision in which many interested amici filed briefs and participated. The Board should not suddenly and arbitrarily jettison

a rule that protects and promotes the "gold standard" of employee free choice, the secret-ballot election. Gissel Packing, 395 U.S. at 602 ("secret elections are generally the most satisfactory--indeed the preferred--method of ascertaining whether a union has majority support"). The Board should not become a tool of partisan special interests more concerned with political power and silencing the secret ballot than employee free choice.

CONCLUSION: The Request for Review should be summarily denied.

Respectfully submitted,

/s/ Glenn M. Taubman

_____

Glenn M. Taubman, Esq.
c/o National Right to Work Legal
Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
gmt@nrtw.org

Attorney for Petitioner Michael Lopez

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Petitioner's Opposition to the Request for Review to be filed electronically with the National Labor Relations Board's Office of the Executive Secretary and with NLRB Region 16 through the NLRB's e-filing program.

I further certify that pursuant to the Board's preference that service of e-filed documents on other parties be effectuated by electronic mail, I caused a copy of this document to be served by e-mail on the following parties:

Brad Manzolillo
United Steelworkers
bmanzolillo@usw.org

Keith White
Counsel for Employer
Keith.White@btlaw.com

and

Nadine Littles, Resident Officer
Jamal Allen, Attorney
NLRB Region 16
nadine.littles@nlrb.gov
jamal.allen@nlrb.gov

Dated: August 11, 2010

/s/ Glenn M. Taubman

_____

Glenn M. Taubman
Attorney for Petitioner